Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

No. 80-43

TEMPLETON'S SERVICE, INC., ET AL.,
Petitioners,

v.

MOBIL OIL CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	PAGE
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
I. Review Is Not Merited Because TECA's Opinion Is Fully in Accord with Other Cases Involving Competitive Allowances	7
II. Petitioner's Assertion That TECA Misapplied Rule 15(b) FRCP Is Without Merit and Review Is Unwarranted	9
III. TECA Did Not Err in Holding That All Mobil Retail Service Station Dealers in the Detroit Resale District Comprise One Class of Purchaser	10
CONCLUSION	14
APPENDICES	1a

TABLE OF AUTHORITIES

	PAGE
Cases	
Atlantic Richfield Co. v. *Zarb*, 532 F. 2d 1363 (TECA 1976)	8
Merry Twins, Inc., et al. v. *Exxon Corporation*, 611 F. 2d 874 (TECA 1979)	7
Mr. Magic Car Wash, Inc. v. *Department of Energy*, 596 F. 2d 1023 (TECA 1978)	7

PAGE

Mr. Magic Car Wash, Inc. v. *Mobil Oil Corporation*, Civil Action No. 75-881 (WD Pa. 1976), *app. dism.*, No. 76-1888 (3rd Cir. 1977) 7-8n

Proctor v. *Gissendaner*, 579 F. 2d 876 (5th Cir. 1978) 10n

Pugliano v. *Mobil Oil Corporation*, Civil Action File No. 75-214 PHX (D Ariz. 1978) 7n

Shell Oil Company v. *Federal Energy Administration*, 400 F. Supp 964 (SD Tex. 1975), *aff'd.*, 527 F. 2d 1243 (TECA 1975) 8,12

United States v. *Johnston*, 268 U.S. 220 (1925) 9

Rulings

FEA Ruling 1975-2 11,12

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Questions Presented

1. Whether, on the particular facts of this case, the court of appeals erred in determining that the district court *sua sponte* injected and decided a claim that was never pleaded or tried.

2. Whether, on the particular facts of this case, the court of appeals erred in holding that all Mobil retail service station dealers in the Detroit Resale District comprise one class of purchaser under the applicable FEA regulations, thereby reversing the district court for its irreconcilable findings of fact and its inappropriate reliance on a portion of FEA Ruling 1975-2 which was both factually inapposite and impliedly overruled by decisions of the court of appeals subsequent to its promulgation.

Statement of the Case

The essential facts of the case are set forth in the opinion of the court of appeals.[1] In light of the petitioners' repeated mischaracterization of the issue presented to the district court, however, Mobil will amplify below the precise nature of the claim and the issue raised for decision.

At several points in the Petition, there appear mistatements of the question presented to the district judge:

> Plaintiffs contended that "N" dealers were a separate class of purchaser, and Mobil's base price to "N" dealers should therefore have been different from the base price charged to "OG&L" dealers. However, Mobil's "base price" to all dealers in the Detroit District — both "OG&L" and "N" — was the same. It was Plaintiffs' contention that Mobil was required by FEA pricing regulations to compute a separate base price for "N" dealers. (Pet. 4)
>
> * * *
>
> . . . The issue before the district court was to determine what were the classes of purchasers of Mobil gasoline in the Detroit District. . . . (Pet. 8)

---

[1] TECA's opinion is set forth as Appendix B to the Petition at pages 15a-24a (hereinafter "Pet. App."). "J.A." citations are to the Joint Appendix filed in the court of appeals.

* * *

> The precise issue before the district court was the identification of the appropriate class of purchasers under the governing FEA regulations. . . . (Pet. 10-11)

Standing in stark contrast with those statements is the plain fact that the *only* class of purchaser ever asserted by petitioners was a class consisting of N dealers with allowances, which allowances, petitioners asserted, constituted cost-justified "customary price differentials." Therefore, TECA was correct when it found (Pet. App. 20a) that the district court had proceeded, *sua sponte*, to decide a claim that was never presented to it, i.e., never pleaded or tried. The specific claim asserted by the petitioners, in their Complaint, the joint Final Pretrial Order and elsewhere, was that Mobil improperly withdrew their respective allowances on gasoline purchased from Mobil. The record, in fact, is replete with references to the undeniable basis of petitioners' claim:

Complaint (Paragraphs 11, 13, 14; J.A. 605):

> 11. Pursuant to said regulations, Defendant was legally obligated to continue in effect such price allowances as were in effect on May 15, 1973, as set forth in 10 C.F.R. 212.82.
>
> * * *
>
> 13. *Plaintiffs herein are a class of puchasers* within the meaning of the regulations, *all being owners of the property on which their stations are located who have customarily received a price differential in the form of such allowances*, as set forth in 10 C.F.R. 212.31.[2]

---

[2] Emphasis throughout is added unless otherwise noted.

14. The Defendant's acts as aforesaid in discontinuing said allowances were in violation of Section 212.82 and Section 212.31 of said regulations, as more particularly set forth in FEA Rulings 1974.18 and 1975.2.

Final Pretrial Order (Paragraphs 1, 5A; J.A. 663, 666, 667):

1. *Plaintiffs' claim.* The withdrawal of allowances being paid to plaintiffs per gallon of gasoline on May 15, 1973, was a violation of regulations promulgated by the Federal Energy Office (now Federal Energy Administration) which required the defendant to maintain customary price differentials in effect as of that date for a *class of purchasers, of which plaintiffs are a part, consisting of all Mobil "N" dealers* (those owning their stations as opposed to those who leased their stations) *who received allowances from defendant.*

* * *

5. *Legal issues.*

A. Plaintiffs' statement of legal issues.

1. *Whether all N dealers* in the Detroit Resale District *who received allowances* as of May 15, 1973 *is the appropriate "class of purchaser"* for the purpose of 10 CFR Section 212.31.

* * *

5. Whether defendant violated FEA regulations, 10 CFR Section 212.1, et seq., requiring Mobil to maintain customary price differentials in effect as of May 15, 1973 for a

> *class of purchasers, of which plaintiffs are a part, consisting of all Mobil N dealers in the Detroit Resale District who received an allowance* from Mobil, by withdrawing said allowances.

Plaintiffs' Trial Brief (p. 6):

> (b) *Class of Purchasers*
>
> Plaintiffs are a part of a class of purchasers consisting of all Mobil "N" dealers within the Detroit resale district receiving allowances on May 15, 1973.

Plaintiffs' Opening Statement (J.A. 7-8):

> . . . These were their dealers; that they had contracts; that they were receiving the allowances; that the allowances were withdrawn; that the allowances were in effect on May 15th of 1975 [sic] are matters which, for the most part, constitute our prima facie case.
>
> We are showing primarily that these were dealers; that *they were a separate class of puchaser by virtue of being dealers who received competitive allowances* from this district, and as a result, the defendant, Mobil was under a duty to compute a weighted average for that class of purchasers. . . .

Moreover, the district judge's August 2, 1977 Memorandum Opinion acknowledged at the outset the precise nature of petitioners' claim (Appendix A to the Petition; Pet. App. 1a):

> . . . This is a suit for monetary damages brought by four of one hundred twenty Detroit area owner-dealers of Mobil Stations (hereinafter

> referred to as "N" dealers) alleging that the Mobil Oil Corporation ("Mobil") violated certain of these regulations by discontinuing certain "competitive discounts" on purchases by these "N" dealers that had been in effect on May 15, 1973 under retail dealer contracts.
>
> It is the claim of the plaintiffs that in the Detroit Resale District, "N" dealers who were receiving "competitive discounts" as of May 15, 1973 constitute a "class of purchaser" as defined by FEA regulations and that these "competitive discounts" given to the members of this class constituted a "customary price differential" as used in those regulations. Plaintiffs contend that the failure of Mobil to continue this "customary price differential" to this "class of purchaser" violated a regulation of the FEA requiring that such price differentials be maintained.

Petitioners *never* contended that they suffered damage because of Mobil's failure to recognize separate OG&L and N dealer classes and to compute a separate base price for the N dealer class. It is clear beyond peradventure that the trial court injected and decided a claim never presented to it.

Reasons for Denying the Writ

Petitioners seek to portray this case as having broad significance by claiming that TECA's decision somehow affects service station dealers other than petitioners and oil companies other than respondent (Pet. 6-7). In reality, the decision is very limited in scope. All that the ruling represents is a determination that on the

particular facts of this case, given Mobil's method of doing business and its practices regarding dealers in the Detroit area, all Mobil retail service station dealers, both OG&L and N, in the Detroit Resale District comprise but one class of purchaser under the applicable FEA regulations (Pet. App. 22a). The case raises no considerations that warrant review by this Court.

I.
Review Is Not Merited Because TECA'S Opinion Is Fully in Accord with Other Cases Involving Competitive Allowances

As indicated by TECA, the result reached in this action is consistent with its opinions in the other cases brought before it which concerned withdrawal of competitive allowances and appropriate retail service station dealer classes of purchaser (Pet. App. 20a n.6). *Mr. Magic Car Wash, Inc.* v. *Department of Energy*, 596 F. 2d 1023 (TECA 1978); *Merry Twins, Inc., et al* v. *Exxon Corporation*, 611 F. 2d 874 (TECA 1979).[3] The decision

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[3] The only other decided case regarding the withdrawal of a competitive allowance of which respondent is aware is the decision of the United States District Court for the District of Arizona in *Pugliano* v. *Mobil Oil Corporation*, Civil Action File No. 75-214 PHX (January 16, 1978), wherein the court held that there was only one class of retail service station dealer purchasers, that Mobil was justified in withdrawing a competitive allowance which had been granted to an N dealer, and that real estate costs were not related to the price of gasoline. Attached as Appendix A. In *Mr. Magic Car Wash, Inc.* v. *Mobil Oil Corporation*, Civil Action No. 75-881 (WD Pa., May 4, 1976), a civil suit filed by Mr. Magic following the decision and order of the FEA which was later affirmed by TECA in

(Cont'd. on following page)

below is also consistent with TECA's earlier opinions in *Atlantic Richfield Co.* v. *Zarb*, 532 F. 2d 1363, 1370 (TECA 1976) ("the FEA simply has no authority to regulate directly or indirectly the use of real property, or the leasing of service station property.") and in *Shell Oil Company* v. *Federal Energy Administration*, 527 F. 2d 1243 (TECA 1975), which held that the FEA does not have authority to control rents charged for service station property, the district judge herein having erroneously based his *sua sponte* two-class determination on what he found to be a difference in "economics of sales" (Pet. App. 9a; i.e., real estate ownership and rental factors, Finding of Fact 22, Pet. App. 5a) between Mobil and its OG&L dealers and its N dealers. Review by certiorari here is particularly unwarranted since TECA's decisions on the subject are consistent with one another and because TECA is a specialized court which has developed unique expertise in applying the complex class of purchaser regulations at issue.

(Cont'd. from preceding page)
Mr. Magic Car Wash, Inc. v. *Department of Energy, supra*, the district court granted summary judgment for defendant on the basis that the case amounted to a prohibited collateral attack on a final agency decision in derogation of the statutory scheme for judicial review. Appendix B. On appeal, the United States Court of Appeals for the Third Circuit ordered the appeal dismissed for lack of jurisdiction, noting that if it had jurisdiction, it found "no merit" in Mr. Magic's contentions as to the withdrawal of its competitive allowance. Appendix C.

II.
Petitioners' Assertion That TECA Misapplied Rule 15(b) FRCP Is Without Merit and Review Is Unwarranted

TECA painstakingly reviewed the trial record and unanimously concluded that the trial court *sua sponte* decided a claim that was never pleaded nor tried. Even the concurring judge (on whose opinion petitioners rely heavily as to their alternative purported basis for certiorari) stated that he was satisfied based upon his review of the record that the claim that N dealers and OG&L dealers constituted separate classes of purchasers was not properly before the district court (Pet. App. 23a).

Notwithstanding TECA's careful scrutiny of the record, petitioners would have this Court embark on its own time-consuming examination of the trial transcript in an effort to determine whether the question of separate N and OG&L classes was tried by necessary implication (there being no citation to the record by petitioners to show that the matter was expressly litigated). This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v *Johnston*, 268 U.S. 220, 227 (1925). There is certainly no compelling reason to engage in such fact sifting here, not in light of the unequivocal statements repeatedly made in pleadings and orally at trial by petitioners' counsel — and in the opening paragraphs of the trial judge's opinion — as to the real issues litigated. Considering the totality of those statements it strains credulity to suggest as petitioners do that the matter of separate N and OG&L dealer classes of purchaser was

tried by necessary implication.[4] TECA was thoroughly correct when it stated that once the trial judge determined that the petitioners' allowances were truly competitive in nature and hence properly withdrawn by Mobil, and were not cost-justified "customary price differentials," such that no class of N dealers with allowances existed as claimed by petitioners, the case should have ended (Pet. App. 20a).

Moreover, review of TECA's decision on the procedural basis advanced by petitioners is unwarranted because it involves no question of first impression or novel issue of law, nor does it implicate any of the considerations which normally attend review by certiorari. All petitioners would have this Court do is apply settled principles of federal civil procedure to the particular facts of this case.

III.
TECA Did Not Err in Holding That All Mobil Retail Service Station Dealers in the Detroit Resale District Comprise One Class of Purchaser

Assuming *arguendo* that the matter of separate N and OG&L classes had been pleaded or tried, TECA's holding is correct because there is no cost-justified

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[4] Had petitioners really believed that the issue was before the court notwithstanding their accumulated unequivocal statements to the contrary, they would have moved at the close of the proofs to conform the pleadings to the evidence. They never did so, and were undoubtedly as surprised as respondent at Judge Joiner's opinion, which both denied them the relief they specifically prayed for and afforded them an argument they never raised. *Proctor* v. *Gissendaner*, 579 F. 2d 876, 885 n.20 (5th Cir. 1978), relied upon by petitioners for the proposition that no formal amendment need be made, is inapposite, since a stipulation by defendant was held to operate as an express or implied amendment of the pleadings within the meaning of Rule 15(b). Mobil never so stipulated.

"customary price differential" between N dealers and OG&L dealers as that term is comprehended in the applicable FEA regulations.

In reaching the conclusion of two classes of purchasers, the district court in its Memorandum Opinion relied both upon Example 6 in FEA Ruling 1975-2 and also what the court referred to as a difference in "economics of sales" (Pet. App. 9a) between Mobil and its N dealers on the one hand and its OG&L dealers on the other, and concluded that there was a distinction between them in terms of "type of purchaser." The reliance in each instance is unjustified in fact and in law.

As regards Example 6, the following language must be noted:

> Those dealers that leased their stations from Firm F paid a *nominal* monthly rental charge to Firm F, but in an amount well below the market value of the property. (Pet. App. 44a)

The facts in this case are directly to the contrary. Indeed, Finding of Fact 29 is that "Mobil's basic objective in determining service station rents to be charged its OG&L dealers is to collect as rent between *15 and 20 percent* of a dealer's *gross profit* on the operation of the *entire business*" (Pet. App. 6a), which certainly cannot be considered nominal rent. Moreover, the following language also appears in Example 6:

> It is apparent that Firm F's prices to its dealers which leased their stations from it included an amount which partially compensated Firm F for its rental of real estate. Therefore, there was a sufficient cost-justified distinction between dealers that leased their stations from Firm F,

> and those that did not, for Firm F to have given the latter a discount consistent with the Robinson-Patman Act. (Pet. App. 44a)

But the trial court's Finding of Fact 30 expressly negates any notion of a relationship between Mobil's rate of rental return on OG&L stations and the Dealer Tankwagon ("DTW") price of gasoline charged to *all* dealers:

> Mobil charges rents to its "OG&L" dealers for use of the service station premises pursuant to a written Service Station Lease; gasoline is supplied to and paid for by "OG&L" dealers pursuant to a separate Retail Dealer Contract. *There is no relationship between the rentals which Mobil charges its "OG&L" dealers and the price of gasoline which Mobil charges to all its retail service station dealers alike, "OG&L" and "N"; i.e., the DTW price.* (Pet. App. 6a)

Since the court explicitly found that there was no relationship between real estate costs at OG&L stations and the DTW price of gasoline, Example 6 in ruling 1975-2 is inapposite and was improperly relied upon by the court in arriving at the conclusion of a different "economics of sales" between OG&L and N dealers. In short, rents are not prices; both at law and in practice at Mobil, the two are totally independent of one another. *Shell Oil Company* v. *Federal Energy Administration*, 400 F. Supp 964 (SD Tex. 1975), *aff'd.*, 527 F. 2d 1243 (TECA 1975).[5]

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[5] Other than the improperly-considered rental factors, the *only* distinguishing characteristic between N dealers and OG&L dealers is that N dealers were sometimes granted competitive allowances while OG&L dealers were not. Petitioners at several points place

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As regards the district court's reference to a difference in "economics of sales" between Mobil and its OG&L dealers and its N dealers, the only possible support for such statement, apart from the inapposite and deservedly discredited Example 6, is Finding of Fact 31: "Mobil realized cost savings and advantages from doing business with N dealers, which cost savings and advantages were not realized when doing business with OG&L dealers" (Pet. App. 6a), which in turn of necessity has to refer to Finding of Fact 22: "Mobil has no expenses relating to the upkeep, ownership or leasing of property on which the stations of plaintiffs and other N dealers are located" (Pet. App. 5a).[6] Implicit in the finding that Mobil "realized cost savings" in doing business with N dealers because Mobil does not have real property acquisition or maintenance costs at such locations is an assumption (similar to that originally set forth in Example 6 of Ruling 1975-2) that the rental structure at Mobil's OG&L

(Cont'd from preceding page)

much emphasis on that fact as if it were of significance. However, by definition, no OG&L dealer would receive a competitive allowance because Mobil already owned or controlled the station premises; the competition in the marketplace which engendered competitive allowances was to acquire or maintain N dealers. Thus, Finding of Fact 21 (Pet. App. 5a) is a tautology. Moreover, that Mobil would not bear the underlying expense of owning or maintaining N dealer locations played no role whatsoever in the decision to grant a competitive allowance; they were granted solely to meet competitive offers by other oil company suppliers, and hence, as held by the district court, were properly withdrawn by Mobil when that competition ceased to exist (Pet. App. 10a). See Findings of Fact 14, 17, 20, 21, 23, and 25 (Pet. App. 4a, 5a-6a).

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[6] Finding No. 22 in and of itself is an accurate enough statement, by definition, but it is a fact without consequence in terms of Mobil's pricing of gasoline to retail service station dealers, which is totally independent of real estate considerations.

stations somehow correlates to the DTW price of gasoline. Both the district court's own Findings and the case of *Shell* v. *FEA* reject a relationship between service station rents and gasoline prices. TECA's holding that there was only one class of purchaser is correct and does not warrant review by certiorari.

Conclusion

The decision below applied settled law to the particular facts of this case and arrived at a just result. No important or novel issues of law warranting review by this Court are presented by that decision. The petition should accordingly be denied.

Respectfully submitted,

August 13, 1980

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APPENDICES

APPENDIX A

January 16, 1978
(Phoenix-Prescott Minutes)
Judge Muecke, continued

10:00 A.M.

CIV 77-224 PHX — Bert A. Ferganchick, et ux v. U.S.A.

Bolding Oseran & Zavala;
Streich Lang, et al;
U.S. Attorney
Black Robertshaw, et al
Burch Cracchiolo, et al

(17) Pltfs' Motion to Expedite Pretrial Procedure & Trial Setting.

Ed Bolding pres. for pltf., George Nielsen pres. for deft. U.S.A., K. C. Weyl pres. for Kola, Inc., 3rd party deft.

Local Rule 42 shall be complied with on the June date previously set - matter will then be set for trial.

CIV 75-213 PHX — C. James Pugliano vs. Mobil Oil Corporation

Donald D. Meyers;
McCutchen Black, et al
Ryley Carlock & Ralston

(15) Deft's Motion for Summary Judgment. (22) Deft's Motion for Leave to File Amended Answer to Complaint. (23) Deft's Motion to Strike Affidavit of C. James Pugliano.

R. Jeffrey Blankenburg pres. for pltf., George Read Carlock, Bill E. Schroeder and Mark Rochefort pres. for deft.

IT IS ORDERED that (15) Deft's Motion for Summary Judgment be granted (22) Deft's Motion for Leave to File Amended Answer to Complaint is granted; (23) Deft's Motion to Strike Affidavit of C. James Pugliano is moot.
**for the reasons stated in Court and for all other reasons stated in the pleadings.*

CIV 75-214 PHX — C. James Pugliano, et al vs. Mobil Oil Corporation

Donald D. Meyers;
Ryley Carlock & Ralston
McCutchen Black, et al.

(43) Deft's Motion for Summary Judgment (45) Deft's Motion for Leave to File Amended Answer

Same appearances as above.

(43) Deft's Motion for Summary Judgment is granted;* (45) Deft's Motion for Leave to File Amended Answer is granted.

JUDGMENT

(United States District Court
for the District of Arizona)

C. James Pugliano vs. Mobil Oil Corporation. Civil Action File No. 75-213 PHX-CAM

This action came on for (hearing) before the Court, Honorable C. A. Muecke, United States District Judge,

presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the Plaintiff take nothing, and that the complaint and action are dismissed.

Dated at Phoenix, Arizona, this 16th day of January, 1978.

W. J. Furstenau
Clerk of Court

By: /s/ D. Nerone
Deputy Clerk

JUDGMENT

(United States District Court
for the District of Arizona)

C. James Pugliano, et al vs. Mobil Oil Corporation. Civil Action File No. 75-214 PHX-CAM

This action came on for (hearing) before the Court, Honorable C. A. Muecke, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the Plaintiffs take nothing, and that the complaint and action are dismissed.

Dated at Phoenix, Arizona, this 16th day of January, 1978

W. J. Furstenau
Clerk of Court

By: /s/ D. Nerone
Deputy Clerk

STATEMENT OF FACTS ON WHICH MOBIL RELIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

(In The United States District Court for The District of Arizona)

C. JAMES PUGLIANO, Individually, and on behalf of a class of persons and other legal entities similarly situated, *Plaintiffs*, vs. MOBIL OIL CORPORATION, a New York corporation, *Defendant*, (No. CIV 75-214-PHX-CAM)

Defendant Mobil Oil Corporation (hereinafter "Mobil") in compliance with Local Rule 11(h) files this statement of facts on which Mobil relies in support of its motion for summary judgment against plaintiff C. James Pugliano:

1. In February 1973, Mobil and plaintiff entered into written agreements constituting three supply contracts whereby Mobil was to sell and plaintiff to purchase petroleum products for three service station locations in Arizona.

2. Plaintiff had been a sales representative in Arizona for the American Oil Company and upon American's leaving the Arizona retail market plaintiff purchased three of American's stations, one each in Phoenix, Scottsdale and Sierra Vista.

3. In late 1972, plaintiff commenced negotiations with several suppliers of petroleum products, including Mobil, to supply petroleum and related products to the foregoing three service station sites.

4. During the negotiations with Mobil, plaintiff requested that Mobil give him an allowance off Mobil's standard dealer tankwagon price.

5. In support of his request for a competitive allowance, plaintiff told Mobil that other suppliers with whom plaintiff had been negotiating had made firm offers to plaintiff to supply plaintiff with gasoline at prices which were below Mobil's dealer tankwagon price and that unless Mobil could meet the competitive offers plaintiff would not enter into a supply contract with Mobil and would select another supplier.

6. Plaintiff prepared and executed sworn statements which set forth the essential terms of the offers which plaintiff had received from Mobil's competitors and which, if not substantially met by Mobil, would result in plaintiff selecting another supplier or suppliers. Mobil independently verified the competitive offers made to plaintiff by Mobil's competitors.

7. Since Mobil desired plaintiff's business and since the market conditions and the existence of competitive offers justified it, Mobil agreed to grant plaintiff a competitive allowance of two cents per gallon of gasoline purchased. As part of their agreement, on February 12, 1973, the parties entered into three identical letter agreements setting forth the terms and conditions upon which the two-cent allowance was granted.

8. Performance of the retail dealer agreements for the Phoenix and Scottsdale stations commenced on April 1, 1973. The agreement for the Sierra Vista station, however, never became effective. By letter

agreement dated March 29, 1973, Mobil and plaintiff suspended the Sierra Vista station agreement and replaced it with a retail dealer agreement between Mobil and George Clark, plaintiff's lessee/operator. The Clark agreement has remained in full force and effect to the present.

9. In the spring of 1973, Mobil together with the remainder of the petroleum industry experienced a severe and unexpected shortage of product which created a supply-demand imbalance.

10. Because of the supply shortage, the competitive pressures in Pugliano's market were reduced. Many suppliers were no longer taking on new accounts and most were unwilling to grant competitive allowances in order to attract new business.

11. Pursuant to its responsibilities under the Robinson-Patman Act, Mobil undertook to review retail accounts receiving a competitive allowance to determine if the competitive circumstances which initially had been the basis for granting the allowance still existed. With respect to plaintiff Mobil determined that a two-cent allowance was no longer justified and that plaintiff's business could be retained by Mobil if the allowance were reduced to one cent per gallon.

12. Plaintiff was notified of the foregoing reduction by letter dated May 31, 1973, effective June 15, 1973.

13. Although plaintiff had the right to terminate his retail dealer contracts with Mobil and obtain another supplier for all or any combination of the three stations, plaintiff elected to remain with Mobil.

14. Plaintiff has received a competitive allowance of one cent on each gallon of gasoline purchased by each

of the three service station locations from June 15, 1973 to the present. From April 1, 1973, to June 15, 1973, plaintiff received a competitive allowance of two cents per gallon. Thus, during the entire term of the parties' supply agreements, plaintiff has effectively received a competitive allowance of either one or two cents under Mobil's standard dealer tankwagon price.

15. On November 10, 1976, the court entered an order establishing that plaintiff's competitive allowance had been given by Mobil in good faith to meet offers made by competitors of Mobil and accordingly, was a price differential justified under the meeting competition proviso of the Robinson-Patman Act.

16. Mobil sells and delivers gasoline to its OG&L dealers and its N dealers according to the same methods and quantities and Mobil enters into the same standard form retail dealer contract with all of its service station operators, N dealers and OG&L dealers alike.

17. Mobil employs standard methods and quantities of selling and delivering gasoline to all its retail gasoline dealers in the Phoenix and Sierra Vista areas in which plaintiff's service stations are located.

18. Plaintiff incorrectly contends, however, that his two cent per gallon competitive allowance could have been cost justified under the Robinson-Patman Act on the basis of differing costs to Mobil in dealing with plaintiff as compared to dealing with Mobil's OG&L dealers. The alleged differing costs relied on by plaintiff are costs of investment in OG&L service station facilities and costs of insurance, property taxes and maintenance incurred in connection with Mobil's OG&L real estate operation.

19. Mobil accounts for its OG&L real estate operation separately from its gasoline sales operation. In respect of a significant number of Mobil OG&L dealers in the Arizona/Utah Sales District in which plaintiff's service stations are located, Mobil earns a profit on its real estate operation alone.

20. Mobil's investment in its OG&L service station facilities varies significantly from facility to facility. In some cases Mobil owns all of the property comprising the OG&L service station facilities. In other cases, all or some of the property is leased by Mobil under a ground lease or a ground and improvement lease. Under the terms and conditions of some of Mobil's ground leases, the improvements revert to the lessor at the expiration or termination of the lease or the lessor has the option to purchase the improvements from Mobil at a nominal price. Sometimes, an OG&L dealer owns, and is responsible for, equipment and other personal property used in connection with the service station.

21. The costs Mobil incurs in connection with its OG&L landlord activities also vary significantly from dealer to dealer. Each OG&L dealer is responsible for maintaining casualty and liability insurance covering the facilities which are the subject of his lease. Mobil incurs an expense for insurance only on those rare occasions on which the terms of a ground lease or a ground and improvement lease require that Mobil maintain additional insurance for the benefit of the lessor.

22. As for taxes, each OG&L dealer is required to pay all business taxes and licenses and to pay all personal property taxes on equipment or other personal property which he owns and uses in his service station. Mobil is not, however, necessarily responsible for the

remaining real and personal property taxes because under the terms of a number of Mobil's ground leases and ground and improvement leases, the lessor retains liability for all or some of the taxes on the property comprising the service station facilities.

23. Maintenance expenses are allocated between Mobil and its OG&L dealers and much of Mobil's responsibility to maintain the facilities is discretionary with Mobil. In addition, under the terms and conditions of some of Mobil's ground leases or ground and improvement leases, the lessor, not Mobil or the OG&L dealer, agrees to maintain the service station facilities.

24. Mobil, at its expense, performs for plaintiff many of the maintenance functions which it performs for its OG&L dealers. Mobil areed (1) to paint plaintiff's service station facilities, (2) to lend plaintiff and to maintain gasoline dispensers used at plaintiff's Phoenix and Scottsdale service stations and (3) to maintain service station signs which Mobil leases to plaintiff.

25. Plaintiff's competitive allowance could not be cost justified under the Robinson-Patman Act and was not a customary price differential under the federal price controls.

26. Mobil was entitled to reduce plaintiff's competitive allowance in light of the changed competitive situation which had initially justified it.

27. Plaintiff at all times was a member of a single Mobil retail dealer class of purchaser.

28. At all times plaintiff paid Mobil's dealer tankwagon price for the puchase of gasoline and received a competitive allowance in the form of a

monthly refund of not less than 1.0 cent per gallon of gasoline purchased.

Dated: September 29, 1977.

Respectfully submitted,

McCUTCHEN, BLACK, VERLEGER
& SHEA
JACK D. FUDGE
BILL E. SCHROEDER
JOHN M. ROCHEFORT

By /s/ Bill E. Schroeder
and
RYLEY, CARLOCK & RALSTON
GEORGE READ CARLOCK

By George Read Carlock

Attorneys for Defendant
MOBIL OIL CORPORATION

APPENDIX B

MEMORANDUM AND ORDER

(In The United States District Court
For the Western District of Pennsylvania)

Mr. Magic Car Wash, Inc. v. Mobil Oil Corporation,
Civil Action No. 75-881

Joseph P. Willson, Senior District Judge.

Plaintiff, Mr. Magic Car Wash, commenced this civil action against defendant Mobil Oil Corporation by filing a two count complaint. Count I charges the defendant with wrongfully violating certain rules and regulations of the Emergency Petroleum Act of 1973 and the Economic Stabilization Act of 1970, as amended. Plaintiff seeks a permanent injunction against defendant commanding it to reinstate and continue a special allowance to plaintiff and also claims treble damages. Jurisdiction on this count rests on Section 7 of the Federal Energy Administration Act of 1974, 15 U.S.C.A. § 766(i)(2)(B), as well as diversity of citizenship. Count II involves charges of fraud and misrepresentation under state law and jurisdiction is founded on diversity of citizenship. In its answer, Mobil sets forth a counterclaim for money which it paid plaintiff during the period of time between July 16, 1974 and March 31, 1975.

Mobil has moved for the entry of summary judgment under Rule 56 to dismiss plaintiff's complaint and to grant its prayer for relief in its counterclaim. Plaintiff, in turn, has moved to dismiss defendant's counterclaim. Counsel have submitted exhaustive briefs on these matters and this Court has heard counsel at oral argument.

At first glance, the various claims of the parties and the applicable laws, regulations and orders tend to color this litigation as an extremely complex and complicated one. The Court is entreated to sift through a maze of federal laws and regulations concerning mandatory fuel allocations and economic stabilization and, in effect, sit in judgment over a decision of the Federal Energy Administration (FEA), an agency set up to administer this program, as it pertains to the pricing arrangement for the sale of motor gasoline from Mobil, as supplier, to Mr. Magic, a retailer. However, in this Court's view, for the reasons stated below, this Court's inquiry will be limited and disposition of this case simplified.

The controversy in this case, involving as it does the history of dealings between the parties, is spelled out in greater detail in the Decision and Order of the Federal Energy Administration dated April 22, 1975, which is marked as Appendix A and is incorporated herein by reference. Suffice it to say, in 1970 the parties entered into five year supply under which plaintiff was given a competitive allowance of 2-1/2 cent per gallon. Following a notice given by defendant on June 26, 1973, that it planned to withdraw the competitive allowance, plaintiff exercised its rights of termination under the contract, which became effective September 18, 1973. The parties had no further dealings until March 1974 when under the FEA Mandatory Petroleum Allocation Regulations, plaintiff was required to purchase its motor gasoline from defendant. Since defendant was unwilling to reinstate the special allowance, plaintiff secured on July 16, 1974, a Remedial Order from FEA Region III in which defendant was ordered to rollback the price to the base price that was in effect on May 15, 1973, which included all special allowances. Defendant

reinstated the special allowances until April 1, 1975, at which time the FEA's Office of Appeals rendered a decision modified the Remedial Order, which in its pertinent part stated:

> "Under the circumstances, Mobil must treat Mr. Magic as a member of its class of purchaser which includes other similarly situated retail dealers under FEA Regulations and Mr. Magic is not entitled to the competitive allowance that it received on May 15, 1973."

After plaintiff's petition for a rehearing was denied by the FEA, this suit was instituted.

In opposition to defendant's motion for summary judgment, plaintiff claims there are genuine factual issues for trial and that since defendant is denying the allegations made by plaintiff there is a clear and genuine issue to be determined by the ultimate trier of fact. However, in this Court's mind, any factual issue which is in dispute is not material to the decision which this Court must render. The 1970 contract and its termination by the parties in September 1973 as well as the resumption, terms and course of their dealings when mandated in March 1974 when the applicable federal petroleum allocation regulations required Mobil once again to supply plaintiff, have all been admitted and are not in dispute. In addition, judicial notice must be given to the final order of the FEA, as amended on April 22, 1975.

What plaintiff is actually attempting to accomplish by this suit is to collaterally attack the final decision of the FEA, having this Court nullify that administrative decision in derogation of the statutory scheme for judicial review of an administrative decision. Such

collateral review of agency action is prohibited. *Elbow Lake Coop. Grain Co. v. Commodity Credit Corp.*, 144 F.Supp 54 (Minn. 1956), affd. 251 F.2d 635. The rationale for such prohibition, especially when dealing in such a complex and vital area as mandatory fuel allocation and economic stabilization, in administering the program and in rendering its decision brings with it expertise in the field which is entitled to great deference by this Court. Though there are certain standards for review, courts initially rely on guidance provided by the administrative agency and before reversing an administrative ruling that agency's input is necessary. In *Associated General Contractors of America v. Laborers International Union of North America*, 476 F.2d 1388, 1407 (1973), with regard to one of FEA's predecessor agencies operating under the Economic Stabilization Act of 1970, the Temporary Emergency Court of Appeals stated:

> ". . . in the absence of equivalent representation or other extraordinary circumstances which we cannot now anticipate no order of any economic stabilization program agency should be mandated or subjected to invalidation in any judicial proceedings unless that Agency has been made party to such proceedings."

It is noted that the FEA has not been made a party to this action. This ommission is fatal to plaintiff's cause of action. Therefore, as to Count I, defendant's motion for summary judgment is appropriate and will be granted.

Count II is likewise subject to defendant's motion for summary judgment. Alleging oral promises by defendant not to utilize certain provisions of their 1970 contract whereby defendant was able to withdraw the

competitive allowance, plaintiff charges defendant with misrepresentation and fraudulent inducement to contract. As a matter of law, plaintiff's claim must fail. First of all, both parties relied on the provisions of the contract included in the rider and plaintiff indeed benefited by those provisions by the forgiveness of a $13,842 debt, and plaintiff is therefore precluded by Mobil's defense of estoppel. Additionally, included in their 1970 contract was an explicit limitation of actions which bars claims "based on or arising out of this contract or otherwise" if not asserted by the commencement of an action within one year from the date of "the event, action or inaction to which such claim relates." Such a private limitation is in accordance with Pennsylvania law. 12A P.S. § 2-725(a). Further, the parole evidence rule, a basic principle of contract law militates against plaintiff. See 12A P.S. § 2-202. Experienced in the business world with the availability of trained counsel, plaintiff was no doubt aware that an oral promise made prior to or contemporaneously with the execution of a written contract, in which the promise is contrary to the express written provisions of their integrated contract, is of no effect and cannot be used to alter their bargain. For these reasons, defendant's motion for summary judgment on Count II of the complaint must also be granted.

Finally, turning to defendant's counterclaim, this Court cannot agree that the final order of the FEA amending the Remedial Order of July 1974, did so *nunc pro tanc*. The final order is silent on this issue. Its command gives prospective effect, not retroactive. It is important to note that even though Mobil was compelled to pay the special allowance following the Remedial Order, on appeal, it never pursued the

matter until they filed their counterclaim here. This question should have been addressed at the administrative level. For this Court to act now would be to disregard proper administrative procedure and in derogation of the general scheme for judicial review, as pointed out earlier in this opinion.

One other point should be made. By not preserving its objection to the payment and obtaining a ruling on that matter from the FEA's Office of Appeals, this Court would treat such payments as being made under a mistake of law and, therefore, preclude any recovery.

This Court regards plaintiff's motion to dismiss the counterclaim as being filed under Rule 12 (b)(6), that is, the counterclaim fails to state a claim upon which relief can be granted. In reaching the decision on each motion, that is, defendant's for summary judgment and plaintiff's for dismissal of the counterclaim, matters outside the pleadings have been presented and not excluded by the Court. These matters are in the first instance the contract between the parties and the orders of the Federal Energy Administration. In this situation plaintiff's motion is being treated as one for summary judgment. Finally, there being no genuine issue as to any material fact, judgment will be entered for defendant on its motion, and judgment will be entered for plaintiff on its motion to dismiss the counterclaim.

ORDER FOR JUDGMENT

AND NOW, May 4, 1976, in accordance with the foregoing Memorandum and upon due consideration, there being no genuine issue as to any material fact, defendant's motion for summary judgment is granted.

AND FURTHER, on plaintiff's motion to dismiss the counterclaim, there being no genuine issue as to any material fact and the counterclaim not stating a claim upon which relief can be granted, it is DIRECTED that the counterclaim be dismissed.

AND FURTHER, the counterclaim being dismissed and defendant having a motion for summary judgment in its favor on the counterclaim, defendant's motion relating to the counterclaim is denied.

IT IS SO ORDERED.

/s/ JOSEPH P. WILLSON
Senior Disrict Judge

cc: Jon Hogue, Esq., Kaufman & Harris, 415 Oliver Bldg., Pgh. 22; Wm. M. Wycoff, Esq., Thorp, Reed & Armstrong, 2900 Grant, Pgh. 1; Donovan, Leisure, Newton & Irvine, 30 Rockefeller Plaza, NYC 10020.

APPENDIX C

JUDGMENT ORDER

(United States Court of Appeals
for the Third Circuit)

NO. 76-1888

Mr. Magic Car Wash, Inc., Appellant, v. Mobil Oil Corporation, No. 76-1888

On Appeal from the United States District Court for the Western District of Pennsylvania. C.A. No. 75-881.

Submitted under Third Circuit Rule 12(6), February 25, 1977.

Before: KALODNER, ADAMS and HUNTER, *Circuit Judges.*

After consideration of all contentions raised by the parties, it is

ADJUDGED and ORDERED that the appeal be and is hereby dismissed for lack of jurisdiction.[1]

Each side to bear its own costs.

BY THE COURT:
/s/ A. N. Adams
Circuit Judge

/s/ Thomas F. Quinn
Clerk

Dated: March 4, 1977

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[1] Assuming, *arguendo*, that this Court had jurisdiction, we find no merit in appellant's contentions.